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Public Service Commission of Wisconsin

Cheryl L. Parrino, Chairman
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Jacqueline K. Reynolds, Executive Assistant
Lynda L. Dorr, Secretary to the Commission
Steven M. Schur, Chief Counsel

April 4, 1995

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APR 06 1995

Mr. William F. Caton, Acting Secretary
Office of the Secretary
Federal Communications Commission
Washington, DC 20554

FCC MAIL ROOM

Re: Computer III Further Remand Proceedings: Bell
Operating Company Provision of Enhanced
Services

CC Docket 95-20

Dear Mr. Caton:

Pursuant to the Notice of Proposed Rulemaking, dated February 7, 1995, we are providing the enclosed comments. Enclosed are the original, plus nine copies, so each Commissioner may receive a personal copy.

Sincerely,

Lynda L. Dorr
Secretary to the Commission

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Enclosure

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

APR 06 1995

FCC MAIL ROOM

In the Matter of:

Computer III Further Remand)
Proceedings: Bell Operating Company)
Provision of Enhanced Services)

CC Docket No. 95-20;
FCC 95-48

COMMENTS OF
THE PUBLIC SERVICE COMMISSION OF WISCONSIN

The Public Service Commission of Wisconsin (PSCW) respectfully submits these comments to assist the Federal Communications Commission (FCC), in its continued inquiry into appropriate safeguards for the enhanced services marketplace. The PSCW has statutory responsibility to address issues related to telecommunications in Wisconsin, including a mandate to promote infrastructure deployment and competition.

We note that FCC Chairman, Reed E. Hundt, has described the history of the Computer Inquiries as long and tortured, and stated that the agency cannot simply repackage its previous policies and gird itself for another round of legal wrangling.¹ The PSCW concurs in the view that new policies and approaches are needed. To assist the FCC in this difficult case, these comments will describe Wisconsin's new telecommunications law and the

¹ Telecommunications Reports; February 13, 1995, pg.19

protections that law provides against anticompetitive practices by local exchange companies (LECs).² In addition, these comments will explain why we believe it is unnecessary to reimpose structural separation (separate companies), and why such protection is less desirable than improvements in nonstructural safeguards (cross-subsidy rules and nondiscriminatory access rules). The comments identify some deficiencies in the current nonstructural safeguards and suggest improvements that can be made to correct such deficiencies.

Regulatory and competitive safeguards are needed when a LEC is both a provider of enhanced services and a supplier of network services, on which competing Enhanced Service Providers (ESPs) depend to provide their services. Two general forms of anticompetitive conduct can occur: (1) Improper cross-subsidization, in which the LECs could undercut ESPs by shifting costs from their enhanced services to their regulated basic services; and (2) Access discrimination, in which LECs provide competing ESPs with inferior interconnection and access to network services that these companies need for their enhanced services. The FCC's Part 64 rules (Part 64), which allocate costs between regulated and nonregulated activity, are intended to address the improper cross-subsidization concerns. The FCC's Open Network Architecture rules (ONA), Customer Proprietary Network Information rules (CPNI), Network Information Disclosure Rules, and Nondiscrimination Reporting Requirements are intended to prevent access discrimination.

² This new law, 1993 Wisconsin Act 496 (Act 496), became effective September 1, 1994.

Wisconsin Act 496 made available a new form of regulation - price regulation. The Wisconsin statutes include additional safeguards to address cross-subsidization concerns. These additional safeguards address the pricing of services to prevent predatory pricing (excessively low prices) of services against competitors or discriminatory pricing of bottleneck facilities used by competitors in their provision of services. Under the former rate base rate of return regulation (ROR regulation) model, accounting safeguards, like Part 64, aided in protection from cross-subsidization by providing the information upon which rates could be adjusted to exclude unallowable costs. Such accounting information will continue to be useful under price regulation in times of reevaluation and for penalty and incentive mechanisms used to adjust prices on an annual basis. However, this protection will not be as exact or as immediate as the former regulated rate adjustments. Therefore, the additional pricing safeguards are an important aspect of Wisconsin's new form of regulation.

Under Act 496, a telecommunications utility can not price services below a price floor³. This price floor is set to be Total Service Long Run Incremental Cost (TSLRIC). In theory, an equally efficient competitor should be able to stay in business if prices are set at or above this floor. TSLRIC is defined in Act 496 as the forward looking costs, using least cost technology that would be avoided if the service had never been offered. Or, alternatively, it is the total cost that a telecommunications provider would incur if it were to initially offer the service given that the telecommunications provider already provides all of its other services.⁴ The purpose of these pricing rules is to provide customers the

³ With an exception made for basic services.

⁴ Sec. 196.015, Wis. Stats.

opportunity, in the long run, to purchase from the most efficient producer of goods and services. In some circumstances, the local telecommunications utility may be the most efficient provider; in other situations, competitors may prove to be the most efficient. Economic theory also holds that the market will establish the upper bound on prices to final consumers, as high pricing leads to excess profits which will attract new competitors into the market place and drive prices down toward costs.

LECs may not discriminate in the sale of bottleneck services to competitors under the imputation rules of Act 496.⁵ A telecommunications utility must charge itself at least tariffed rates plus TSLRIC for all other service elements when the other elements or services are not available within the relevant market from any other telecommunications provider and the telecommunications utility uses the service or element in its offering. This rule prevents the LEC from charging itself a different price (presumably advantageous) than it charges its competitors for bottleneck services.⁶ This imputed price will then be the price floor for charges to final customers according to the TSLRIC rules.

In theory, these pricing rules should protect against both the anticompetitive practices of a LEC unfairly attempting to undercut its competitors in price, or a LEC providing discriminatory interconnection to other providers. The application of these rules will be tested as the new legislative framework is implemented in Wisconsin.

⁵ Section 196.204(6) Wis. Stats.

⁶ Under the assumption that tariffed rates are determined not to be excessive.

The PSCW notes the FCC has attempted to address similar pricing issues in rules related to the creation of access charge sub-elements for Open Network Architecture (ONA).⁷ However, the lower and upper pricing limits adopted appear to be much wider than the Wisconsin standards. The FCC's lower limit is essentially that a service must be priced at a level that covers its direct costs plus any net losses from other services. The FCC's upper limit is a price that is justified by pre-price cap cost support rules. Generally, the FCC rules are consistent with anti-trust pricing requirements for companies operating in competitive markets. Wisconsin's rules can be described as rules designed to be placed on monopoly providers of services that also provide services in competitive markets.

Wisconsin's pricing rules provide safeguards that even structural separation cannot provide. A price cap form of regulation acknowledges that, at times, efficiencies and innovations can lead to earnings which are above-normal returns. Further, the opportunity for above-normal returns provides an incentive for efficiencies that was, otherwise, lacking in ROR regulation. Structural separation or nonstructural accounting safeguards are both methods to protect against cross-subsidization. However, neither method adequately protects against above-normal returns funding market-contracting pricing strategies. Only pricing safeguards such as those adopted in the Wisconsin legislation can protect against pricing strategies that are intended to limit the number of market participants. For this reason, the PSCW believes structural separation is no more sound a regulatory strategy than nonstructural safeguards. In fact, without pricing safeguards, it may be less effective.

⁷ CC Docket No. 87-313, CC Docket No. 89-79

Structural separation would impose substantial additional costs without commensurate benefit. Structural safeguards would require changes in service delivery, such as separate staffs, that would be both inconvenient and confusing to final customers. Structural safeguards would also foreclose the opportunity to achieve economies of scale and scope which would ultimately benefit all consumers. In short, the PSCW believes the reimposition of structural safeguards would be a step backwards in regulation and impede achievement of market efficiency.

As explained earlier, accounting safeguards will have an impact under price regulation, only in a broader manner than was the case under ROR regulation. Accounting safeguards can and should be improved. The PSCW has previously submitted comments to the FCC to that effect in CC Docket No. 93-251, Amendment of Parts 32 and 64 rules. However, as identified in those comments, our proposals went beyond the amendments proposed by the FCC in that docket. Specifically, the PSCW proposed that: (1) intangible asset transfers, in addition to tangible asset transfers, need to be covered under affiliated transaction rules; (2) a shared cost pool should be required for new product and system development costs with a reasonable basis for allocation determined, and (3) the calculation of the general allocator which is applied to common costs should be refined.⁸ The PSCW would like to see these concerns addressed by the FCC at some point in time.

⁸ "Cost Allocations Methods Affect Competition", Anne Wiecki, Proceeding of the Ninth NARUC Biennial Regulatory Information Conference, NRRI 94-20, Volume II, pages 403-427, Describes improvements that can be made to the general allocator.

Customer Proprietary Network Information rules (CPNI) are a form of safeguard against access discrimination. CPNI rules should address access to data on customer usage patterns in a manner similar to the way that ONA rules address access to the physical network. Both are controlled by the LECs as the sole provider of regulated services. Under the same logic that nondiscriminatory access is necessary, safeguards are needed to prevent the LECs from discrimination in access to this information on customer usage patterns, because it is useful to both LECs and their competitors in the marketing and supplying of enhanced services.

Unfortunately, the FCC's current CPNI rules are founded on the perspective that customers expect their usage information to be used by integrated companies. Rules need to recognize the unique characteristic of this data, that it was generated from regulated services provided by a monopoly provider. Currently, FCC rules allow LECs to use CPNI without the customers' affirmative consent for the sale of enhanced services even though it is not made available to competitors. Only where the information is used for the sale of enhanced services for a business customer with more than 20 lines must the LECs obtain customer consent. The current rules provide the LECs with discriminatory access to monopoly generated information. This needs to be corrected.

Network Information Disclosure Rules, and Nondiscrimination Reporting Requirements are both properly focused, however, can be further refined over time. The Nondiscrimination Reporting Requirements protect against discrimination in the installation, maintenance, repair and quality of basic services. Network Information Disclosure Rules

require timely access to new or modified network services affecting interconnection to LEC networks. These are necessary safeguards to ensure LECs provide nondiscriminatory services when the LECs acts a both provider of enhances services and supplier of network services used by competing ESPs. Essentially, these are measures of service quality. With experience, greater assurance can be obtained that the measures and set points used to determine levels of quality reflect customers' desired standards of service. Wisconsin's new telecommunications law includes penalties associated with quality of service measures.⁹ This is a new regulatory focus that will become increasingly important. Regulators will improve the measures applied as experience is gained.

ONA is intended to provide nondiscriminatory access to network services. It should not be the impetus for reimposition of structural separation requirements simply because the model of ONA adopted is more limited than that envisioned in the original Computer III decision. Greater attention to pricing, as discussed above, should readily substitute for such changes. The primary need is that competitors must have nondiscriminatory access to all elements or services that LECs use in their provision of enhanced services.

In short, with improvements, the PSCW believes that nonstructural safeguards can be made sufficiently effective to justify lifting structural separations. In addition, the use of nonstructural safeguards can allow services to be provided more efficiently to all customers yet impose lower regulatory costs than structural separation.

⁹ Sec. 196.196, Wis. Stats.

The PSCW wishes to express its appreciation to the FCC for providing the opportunity to address these issues within the comprehensive framework in which they lie and urge your consideration of these suggestions.

Dated at Madison, Wisconsin, April 4, 1995

Respectfully submitted,

Cheryl L. Parrino

Cheryl L. Parrino
Chairman

Scott A. Neltzel
Scott A. Neltzel
Commissioner

CLP:SAN:AWW:jah:h:\staff\AWW\9520com.